IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

KYLE GROCERY, INC., a South Dakota corporation,

Plaintiff,

v.

RENA SHORT HORN, CHARLES ABOUREZK, Former Chief Tribal Court Judge, DAVID DILLON, Current Chief Tribal Court Judge, OGLALA SIOUX TRIBAL COURT, OGLALA SIOUX TRIBE,

Defendants.

Civil Action No. 21-5092

MEMORANDUM IN SUPPORT OF MOTION TO DROP DEFENDANT CHARLES ABOUREZK DUE TO MISJOINDER AND TO DISMISS THE CASE AGAINST DEFENDANT CHARLES ABOUREZK FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendant Charles Abourezk submits this memorandum in support of his Motion to Drop Defendant Charles Abourezk Due to Misjoinder and to Dismiss the Case Against Defendant Charles Abourezk for Failure to State a Claim upon which Relief Can Be Granted, pursuant to Federal Rules of Civil Procedure 21 and 12(b)(6). Plaintiff challenges the Oglala Sioux Tribal Court's ("Tribal Court") jurisdiction over it, but Plaintiff acknowledges and asserts in its own pleadings that Defendant Abourezk is no longer serving as a judge on the Tribal Court. Thus, Defendant Abourezk is not a proper party to this lawsuit and Plaintiff does not—and cannot—state any claim for relief against him.

STATEMENT OF FACTS

Plaintiff is a grocery store operating on the Pine Ridge Reservation pursuant to a license from the Oglala Sioux Tribe ("Tribe"). Compl. ¶ 2; Compl. Ex. A-1 at 1; Compl. Ex. C at 2.[1] Rena Short Horn, a named defendant in this case, sued Plaintiff in Tribal Court over a slip-and-fall that occurred on Plaintiff's premises on or about February 5, 2019. Compl. ¶¶ 11–12, *see also* Compl. Ex. B (complaint in Tribal Court). Plaintiff moved to dismiss the case based on the Tribal Court's alleged lack of jurisdiction over it, but the Tribal Court (then-Judge Charles Abourezk presiding) denied the motion. Compl. ¶ 16. Plaintiff appealed, and the Oglala Sioux Tribe Supreme Court affirmed the Tribal Court's decision, and remanded the case for further proceedings. Compl. ¶ 21.

Plaintiff now challenges the Tribal Court's finding of jurisdiction in this Court, suing Rena Short Horn, the current Tribal Court judge, the Tribal Court, the Oglala Sioux Tribe, and Defendant Abourezk, a former judge.[2] As relief, Plaintiff seeks preliminary and permanent injunctive relief enjoining further proceedings against it in the Tribal Court, and a declaratory judgment that the Tribal Court may not exert jurisdiction over it. Compl. at 6–7 (prayer for relief). None of this relief is directed at Defendant Abourezk, who is no longer a Tribal Judge.

ARGUMENT

I. Defendant Abourezk Is an Improper Party and Should Be Dropped from this Suit Due to Misjoinder.

Federal Rule of Civil Procedure 21 states that "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party." The "proper remedy" for misjoinder "is a timely

[1] The Court may consider exhibits attached to the complaint in deciding a motion under Federal Rule of Civil Procedure 12(b)(6). *Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 (8th Cir. 2017) (citing *Miller v. Redwood Toxicology Lab, Inc.*, 688 F.3d 928, 931 n.3 (8th Cir. 2012)).

[2] To Defendant Abourezk's knowledge, the other defendants named in this case have not yet been served.

motion to drop the improper party." *Celanese Corp. of Am. v. Vandalia Warehouse Corp.*, 424 F.2d 1176, 1179 (7th Cir. 1970). Rule 21 "grant[s] considerable discretion to the district court" to drop parties from a suit "on such terms that are just." *Moubry v. Kreb*, 58 F. Supp. 2d 1041, 1048 (D. Minn. 1999) (quoting *Lenon v. St. Paul Mercury Ins. Co.*, 136 F.3d 1365, 1371 (10th Cir. 1998)).

Generally, the terms for dropping a party are "just" so long as dismissal of the party would "not cause 'gratuitous harm'" to the other parties. *Strandlund v. Hawley*, 532 F.3d 741, 745 (8th Cir. 2008) (quoting *Elmore v. Henderson*, 227 F.3d 1009, 1012 (7th Cir. 2000)). Such harm might occur if dismissal resulted in the loss of claims, *see id.* at 746, or if the party to be dismissed is indispensable, *see Moubry*, 58 F. Supp. 2d at 1048 ("[Rule 21] discretion is circumscribed . . . by Rule 19(b) because the court cannot proceed without indispensable parties." (citation omitted)). If these concerns are not at stake, however, the U.S. Supreme Court has acknowledged that "it is well settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989).

As a private citizen, Defendant Abourezk is an improper party because he no longer holds judicial office with the Tribal Court and therefore has no control over the ongoing Tribal Court case against Plaintiff, and the declaratory and injunctive relief Plaintiff seeks would not be directed toward him. As an improper party, Defendant Abourezk is dispensable and his dismissal, especially at this earliest stage of litigation, would cause no harm or prejudice to the other parties. Diversity is not an issue here, as Plaintiff asserts federal question jurisdiction.[3]

[3] The diversity element generally comes into play if it appears a party is attempting to fraudulently join a nondiverse party in order to defeat the court's diversity jurisdiction or when a court is otherwise able to preserve jurisdiction by dismissing an indispensable nondiverse party. *See, e.g.*, *Fritz v. Am. Home Shield*

Compl. ¶ 6. Thus, the Court should exercise its discretion to grant Defendant Abourezk's Motion and drop him as a party from this lawsuit.

A. Defendant Abourezk Is an Improper Party Because He Is No Longer a Tribal Official and Plaintiff Cannot Obtain the Desired Relief from Him.

Plaintiff demands no relief that may be obtained from Defendant Abourezk because he is no longer a judge in the Oglala Sioux Tribal Court. Plaintiff itself alleges that Defendant Abourezk is a former judge of the Tribal Court. The caption to Plaintiff's Complaint names Defendant Abourezk as the "Former Chief Judge." *See* Compl. at 1. The body of the Complaint further states Defendant Abourezk "*was* the Chief Judge," Compl. ¶ 4 (emphasis added), and refers to him as "Former Chief Judge" again, Compl. ¶¶ 16, 24. This styling, along with Plaintiff's requested relief based on the Tribal Court's exercise of jurisdiction, indicates that Defendant Abourezk was sued in his official capacity—which he no longer maintains. Additionally, "[i]f the complaint does not specifically name the defendant in his individual capacity," the default rule in the Eighth Circuit is to "presume[] he is sued only in his official capacity." *Artis v. Francis Howell N. Band Booster Ass'n, Inc.*, 161 F.3d 1178, 1182 (8th Cir. 1998). Plaintiff did not name Defendant Abourezk in his individual capacity, but as the "Former Chief Judge." Compl. at 1. Defendant was sued in his official capacity.

The Tribe is a "quasi-sovereign nation" that possesses sovereign immunity from suit. *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1131 (8th Cir. 2019). "This immunity extends to tribal officials who act within the scope of the tribe's lawful authority." *Id*. (citation omitted). Although, in some circumstances, "tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct,"

Corp., 751 F.2d 1152, 1154 (11th Cir. 1985) ("Courts have employed Rule 21 to preserve diversity jurisdiction by dropping a nondiverse party not indispensable to the action.").

id. (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014)), the very doctrine that allows certain suits for prospective relief against government officials acting in their official capacities states that "such officer must have some connection with the enforcement of the act" alleged to be illegal, *Ex parte Young*, 209 U.S. 123, 157 (1908); *see also 281 Care Comm. v. Arneson*, 766 F.3d 774, 797 (8th Cir. 2014) (explaining "[t]he *Ex parte Young* exception only applies against officials 'who threaten and are about to commence proceedings'" (quoting *Young*, 209 U.S. at 156)). Accordingly, official capacity actions cannot be brought against former officials. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (explaining *Ex parte Young* "does not permit judgments against state officers declaring that they violated federal law in the past" (citation omitted)); *Dooley v. Cook*, No. 20CV1329, 2020 WL 6395576, at *11 (D. Conn. Nov. 2, 2020) ("[Plaintiff] cannot proceed against former Commissioner Cook, who does not have the capacity to provide any requested relief."); *Smith v. Superior Ct. of Riverside Cnty.*, No. EDCV 14-01413, 2016 WL 6072355, at *7 (C.D. Cal. Sept. 7, 2016) ("*Ex parte Young* does not apply because [defendant], now retired, has no current connection to the enforcement of the [statute at issue] . . . ."), *R. & R. adopted sub nom. Smith v. Cal. Jud. Council*, No. EDCV 14-01413, 2016 WL 6078806 (C.D. Cal. Oct. 17, 2016).

Assuming, arguendo, that a suit for prospective relief could be brought against a sitting tribal judge under the proper circumstances, Defendant Abourezk no longer has any official capacity or affiliation with the Tribal Court. He no longer has any "connection with the enforcement" of the Tribal Court's jurisdiction over Plaintiff. Defendant is an improper party due to this fact and the necessary consequence that Defendant has no control over the relief Plaintiff seeks.

Rule 21 "is the proper vehicle for dismissing parties who were improperly joined . . . because no relief is demanded from or no claim of relief is stated against [them]." *Moubry*, 58 F. Supp. at 1048 (quoting *Vakharia v. Swedish Covenant Hosp.*, 765 F. Supp. 461, 472 (N.D. Ill. 1991)). "[W]here certain defendants are clearly without authority or power to effect any of the relief sought by the plaintiffs, a motion to drop those defendants may properly be granted." *Id.* (quoting *Hisp. Coal. on Reapportionment v. Legis. Reapportionment Comm'n*, 536 F. Supp. 578, 584 (E.D. Pa.), *aff'd*, 459 U.S. 801 (1982)); *see also Kodiak Oil & Gas*, 932 F.3d at 1132 (8th Cir. 2019) ("[W]hen seeking to enjoin an improper exercise of tribal court jurisdiction, the tribal official 'must have some connection with the' exercise of jurisdiction." (quoting *Young*, 209 U.S. at 157)).

As explained above, Defendant Abourezk no longer has a position with the Tribal Court, so he has no "connection" to the Tribal Court's exercise of jurisdiction or to Plaintiff's requested declaratory and injunctive relief. Plaintiff asserts no claims for relief against Defendant Abourezk specifically. Rather, Plaintiff seeks preliminary and permanent injunctive relief from further Tribal Court proceedings and a declaratory judgment that the Tribal Court may not exert jurisdiction over Plaintiff. Compl. at 6–7 (prayer for relief). As a private citizen, Defendant Abourezk has no control over, or connection to, these claims for relief. The proper remedy is to drop Defendant Abourezk from this suit pursuant to Federal Rule 21.

B. As an Improper Party, Defendant Abourezk Is Dispensable and Dropping Defendant Abourezk from this Lawsuit Would Cause No Prejudice to the Parties.

As established above, Defendant Abourezk is an improper party to this lawsuit. Therefore, Defendant cannot be indispensable, and dismissing Defendant Abourezk from this case would cause no harm or prejudice to the other parties.

"[I]t is well settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered." *Newman-Green, Inc.*, 490 U.S. at 832. As long as the terms for dropping the party are "just," meaning dismissal would not cause "gratuitous harm" to the other parties, Rule 21 is satisfied. *Strandlund*, 532 F.3d at 745 (quoting *Elmore*, 227 F.3d at 1012). Such harm might occur if dismissal would result in the loss of claims, *see id.* at 746, or if the party to be dismissed is indispensable, *see Moubry*, 58 F. Supp. 2d at 1048.

In *Strandlund*, the Eighth Circuit determined that the district court's Rule 21 dismissal of certain parties without prejudice in a 42 U.S.C. § 1983 action was improper because the timing of dismissal meant the dismissed parties could not refile many of their claims due to the lapsed statute of limitations. 532 F.3d at 746. Here, Plaintiff has made no claims for relief specifically against Defendant Abourezk, nor could any potential claims survive scrutiny due to Defendant Abourezk's status as a private citizen with no control over the Tribal Court's exercise of jurisdiction. Even if there were potential claims, there are no statute of limitations concerns at this early stage of litigation. Dropping Defendant Abourezk from this lawsuit would not affect any of Plaintiff's claims.

For similar reasons, Defendant Abourezk is not an indispensable party. Federal Rule of Civil Procedure 19(b) governs indispensability, listing a number of factors courts must consider. *See Bailey v. Bayer CropScience L.P.*, 563 F.3d 302, 308 (8th Cir. 2009). In the context of this case, these factors would include: (1) the extent to which a judgment rendered in Defendant Abourezk's absence might prejudice Defendant Abourezk or the other parties; (2) the extent to which any prejudice could be lessened or avoided by shaping the relief or by other measures; (3) whether a judgment rendered in Defendant Abourezk's absence would be adequate; and (4)

whether Plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. *See id.*

These factors are easily discharged. Because Defendant Abourezk is an improper party with no claim of relief stated against him, any judgment rendered in his absence would not cause any prejudice to him or other parties under Factor 1 and would be adequate under Factor 3. Factor 2 is irrelevant because there would be no prejudice to mitigate under Factor 1. Factor 4 is also irrelevant, because the action would not be dismissed—only Defendant Abourezk would be dismissed from the action.

Defendant Abourezk is not an indispensable party to this lawsuit and dropping him from the case would cause no harm or prejudice to the other parties—especially at the earliest stage of this litigation. Therefore, the Court should exercise its discretion to drop Defendant from this lawsuit pursuant to Federal Rule 21.

II. Defendant Abourezk Should Be Dismissed from this Suit Due to Plaintiff's Failure to State a Claim Upon Which Relief Can Be Granted.

Under Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for "failure to state a claim upon which relief can be granted." Generally, a complaint must "state a claim to relief that is plausible on its face." *Glick v. W. Power Sports, Inc.*, 944 F.3d 714, 717 (8th Cir. 2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Facial plausibility exists where the court can "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Iqbal*, 556 U.S. at 678). Further, a "complaint may be dismissed under Rule 12(b)(6) unless it can be determined that judicial relief is available." *Davis v. Passman*, 442 U.S. 228, 244 (1979). Thus, "[w]here a complaint alleges no specific act or conduct on the part of the defendant . . . the complaint is properly dismissed." *Potter v. Clark*, 497 F.2d 1206, 1208 (7th Cir. 1974) (per curiam) (citation omitted).

As explained above, in a claim for prospective relief against a government official under *Ex Parte Young*, "the state officer defendant 'must have some connection with the enforcement of the act.'" *Kodiak Oil & Gas*, 832 F.3d at 1131–32 (quoting *Young*, 209 U.S. at 157). The relief sought against a government official must be "prospective rather than retrospective." *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 914 (8th Cir. 1997) (quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 294 (1997) (O'Connor, J., concurring in part)).

Here, the alleged misconduct is the Tribal Court's continuing exercise jurisdiction over Plaintiff. But Plaintiff does not allege that Defendant Abourezk has any "connection with" this ongoing alleged misconduct or its enforcement. To the contrary, Plaintiff characterizes Defendant Abourezk as the "Former Chief Judge" repeatedly. *E.g.*, Compl. ¶¶ 16, 24. Plaintiff seeks preliminary and permanent injunctive relief enjoining further proceedings against it in the Tribal Court, and a declaratory judgment that the Tribal Court may not exert jurisdiction over it. Compl. at 6–7 (prayer for relief). Whether or not Plaintiff has a valid claim as to other defendants, however, Defendant Abourezk cannot be liable for ongoing Tribal Court action because he is no longer affiliated with the Tribal Court in any capacity. Plaintiff cannot seek retrospective relief against him.

As discussed above, Plaintiff seeks relief only from prospective action by the Tribal Court, and not past action. Were the complaint construed to allege a cause of action against Defendant Abourezk for his actions in deciding the motion to dismiss in the Tribal Court case when he sat on the Tribal Court, the action against him would be barred because "a tribal court judge is entitled to the same absolute judicial immunity that shields state and federal court judges." *Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003). "A judge is entitled to absolute immunity for all judicial actions that are not 'taken in a complete absence of all

jurisdiction.'" *Id.* (quoting *Mireles v. Waco*, 502 U.S. 9, 11–12 (1991) (per curiam)); *accord Schmidt v. Fire Thunder*, No. Civ. 05-5097, 2006 WL 8444861, at *3 (D.S.D. May 31, 2006) (citing *Penn*, court dismissed case against Oglala Sioux Tribal Court judge), *aff'd*, 272 F. App'x 536 (8th Cir. 2008) (per curiam).

In ruling on the jurisdictional matter in Tribal Court, Defendant Abourezk was not acting "in complete absence of jurisdiction." Before bringing an action in federal court challenging the exercise of tribal court jurisdiction over them, parties must generally exhaust their remedies in tribal court. *Kodiak Oil & Gas*, 932 F.3d at 1133. It was quite appropriate for then-Judge Abourezk to decide the matter, and he cannot be said to have acted in complete absence of jurisdiction. The Court need not and should not reach the issue of whether the Tribal Court in fact has jurisdiction over the underlying case. In *Penn*, the Eighth Circuit determined that "[w]e need not resolve whether Judge Dog Eagle actually had jurisdiction over this matter," finding the tribal court order "facially valid." 335 F.3d at 790. The Eighth Circuit understood that tribal judges must determine their jurisdiction in the course of the cases before them, and that they cannot be liable merely for making a decision with which a federal judge may later disagree. *Fire Thunder*, 2006 WL 8444861, at *3 (construing tribal judge's jurisdiction broadly for purposes of judicial immunity analysis, asking "whether the act is a function normally performed by a judge and whether the judge was interacting with the party in a judicial capacity"). Here, as in *Fire Thunder*, Plaintiff in fact alleges that Defendant Abourezk was acting in a judicial capacity. *See* Compl. at 1 (caption), ¶¶ 4, 16, 24.

Accordingly, Plaintiff states no claim to relief, much less a "plausible" one, against Defendant Abourezk. For this reason and for all the reasons stated above, this Court should grant Defendant Abourezk's motion and dismiss him from the case.

CONCLUSION

For the foregoing reasons, the Court should GRANT the motion of Defendant Abourezk, and should DROP him as a party to this lawsuit due to misjoinder, pursuant to Federal Rule of Civil Procedure 21, and DISMISS the lawsuit as to him for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted this 11th day of January, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2022, I electronically filed the foregoing Memorandum with the Clerk of the Court using the Court's CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

In addition, I served by mail the parties who have not yet appeared in this case, with copies to their counsel by electronic mail:

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